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PP

v.

AZLI DAUD

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HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CRIMINAL TRIAL NO: 45-19-2005]
26 JANUARY 2010

- C **CRIMINAL LAW:** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Whether accused committed offence of trafficking in a dangerous drug - Presence of a person by the name of Wan backbone of accused's defence - Whether Wan a material witness - Failure to call Wan - Whether fatal to prosecution's case - Whether clearly warranted court to invoke adverse inference rule under s. 114(g) Evidence Act 1950 - Whether defence succeeded in raising reasonable doubt upon prosecution's case - Whether statutory presumption under s. 37(d)(da) Dangerous Drugs Act 1952 could not apply*
- E **EVIDENCE:** *Adverse inference - Failure to produce witness - Whether witness necessary to establish prima facie case - Whether fatal to prosecution's case - Whether adverse inference rule under s. 114(g) Evidence Act 1950 invoked*
- F The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 2,354 grammes of cannabis, an offence punishable under s. 39(B)(2) of the Act which carried the death penalty. PW5, together with his team of officers, raided a house at about 12.30am on 24 July 2004. PW5 identified himself to the accused when he opened the door and
- G entered the house with his men. The only other person in the house with the accused was his wife, PW9. PW5 searched the rear room and it was in this room a postal bag was found (exh. P9A). Inside the postal bag, he found a plastic bag bearing the Astaka brand containing four compressed blocks of plant materials suspected
- H to be cannabis. Tests conducted by the chemist, PW7, confirmed that the drugs were cannabis as defined by the DDA. PW9 testified that the accused was a postman and confirmed that the postal bag was the accused's working bag and that the incriminating exhibits inside the postal bag was not hers. PW8 testified that the accused
- I was one of the postmen under his supervision and the postal bag belonged to the Postal Services but was allocated to the accused in furtherance of his job scope. The accused was solely responsible for

the safekeeping of the said postal bag during and after office hours. From the totality of the testimonies of these witnesses, it was the prosecution's case that the said incriminating exhibits were wholly under the custody and control of the accused; the accused was seized with the knowledge that the said postal bag contained the drugs that was now the subject matter of the charge; that the accused was indeed having in his possession the said postal bag containing the cannabis and the combined weight of the cannabis exceeded the minimum statutory weight of 200 grammes as provided by s. 37(da)(vi) of the DDA and was thus presumed that accused was trafficking in the said drugs. Upon a maximum evaluation of the evidence adduced, the prosecution had made out a *prima facie* case against the accused on the charge proffered. It was the defence of the accused that, PW9's nephew, Wan, had a set of keys to the house and frequented the house. According to the accused, on 23 July 2004, Wan came to the house at 6.30pm and had carried with him a transparent plastic bag and had gone straight to the rear room. The accused testified that he had left for the mosque while Wan remained in his house. When he returned from the mosque, Wan was still in the house. The accused testified that Wan only left the house at 11pm without carrying the plastic bag he had with him earlier. The essence of the accused's defence was a complete denial of having in possession of the said incriminating exhibits and was directly implicating Wan.

Held (acquitting and discharging the accused):

- (1) The presence of Wan in the house formed the backbone of the accused's defence. There was common ground between the defence and the prosecution that Wan was a real person. Both parties were also in agreement that Wan had come into the house at some point in time hours before the house was raided by the police. The presence of Wan and general defence of the accused was not a recent concoction. The prosecution was aware of Wan's presence from the very beginning. (paras 27 & 28)
- (2) From the nature of the defence posited by the accused, it was very apparent that Wan had become a very material witness. It was thus crucial for the prosecution to close the gap enumerated above through Wan. In such event, the failure of the prosecution to call Wan before the close of the prosecution case or to offer Wan to the defence or to call Wan in rebuttal of the defence, clearly warranted the court to invoke the adverse inference rule under s. 114(g) of the Evidence Act 1950,

- A against the prosecution even at the stage of the defence case. Clearly the failure to call Wan or to offer Wan to the defence or in rebuttal was fatal to the prosecution. (para 29)
- (3) The defence was only required to raise a reasonable doubt on the prosecution's case. On the facts and evidence, upon evaluation of the defence's case as against the prosecution's case, the defence had succeeded in raising a reasonable doubt upon the prosecution's case. Conversely the prosecution had failed to prove beyond a reasonable doubt that the accused was in possession of the said postal bag containing the blocks of cannabis therein. Therefore the statutory presumption under s. 37(da) of the DDA could not apply. (para 30)
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Case(s) referred to:

- Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 FC (*refd*)
- D *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 HC (*refd*)
- Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA (*refd*)
- Parlan Dadeh v. PP* [2009] 1 CLJ 717 FC (*refd*)
- PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 FC (*refd*)
- PP v. Chia Leong Foo* [2000] 4 CLJ 649 HC (*refd*)
- E *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC (*refd*)
- Samundee Devan Kerishna Muthu v. PP* [2009] 1 CLJ 498 CA (*refd*)
- Wong Nam Loi v. PP* [1998] 1 CLJ 37 CA (*refd*)

Legislation referred to:

- Dangerous Drugs Act 1952, ss. 2, 37(da)(vi), 39B(1)(a), (2)
- F Evidence Act 1950, s. 114(g)

For the prosecution - Mohd Ashrof Adrin Kamarul DPP

For the accused - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co

Reported by Suhainah Wahiduddin

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JUDGMENT**Ahmadi Asnawi JC:**

- H [1] The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 2,354 grammes of cannabis on 24 July 2004 at about 12.30am at house No. 453A, Kuaters Pos, Jalan Bukit Pasir, Bukit Pasir, Muar, Johor,
- I an offence punishable under s. 39(2) of the Act which carried the mandatory death penalty.

Case For The Prosecution

[2] PW5 (C/Insp. Chu Soon Lee) together with his team of officers raided house No. 453A, Kuaters Pos, Jalan Bukit Pasir, Muar at about 12.30am on 24 July 2004. Upon arrival at the said house, PW5 knocked on the main door. The door was then opened by the accused. Upon identifying himself, PW5 and 5 of his men entered the said house. PW9 (Haslinda binti Mohamad) who had been married to the accused about a week before the said instant was also in the house. A search of the said house was made by SP5 and his party. Nothing incriminating though was found in the main room (master bedroom).

[3] Next PW5 searched the rear room. In this room he found a postal bag (exh. P9A). Inside the postal bag he found a plastic bag bearing the Astaka brand. Inside the plastic bag were four compressed blocks of plant materials suspected to be cannabis. There were two big blocks and 1 small block wrapped in aluminium foils. One other small compressed block was unwrapped.

[4] PW5 also seized a set of the accused's postal uniform from a cupboard inside this room. He also seized a key to the said house.

[5] PW9 is now divorced from the accused. The accused was a postman. She did not know from where the cannabis were recovered from. She confirmed that the postal bag P9A was the accused's working bag and saw the accused using the postal bag for his work on 23 July 2004. She confirmed that the said cannabis were not hers and also confirmed that she did not put the said cannabis inside the said postal bag.

[6] The cannabis seized by PW5 is now the subject matter of the charge levelled against the accused.

The Nature Of The Drug

[7] The investigating officer ('I.O') of the case, ASP Robin Guha Thakurtha, PW10, had these incriminating exhibits (4 blocks of compressed plant materials) examined by the chemist, PW7. The chemist testified at length the four tests he applied to determine the plant materials, namely physical examination, microscopic test, Duquenois Levine Test and Thin layer Chromatography Test. He concluded that the four blocks of plant materials were cannabis within the definition of s. 2 of the DDA, weighing 2,354 grammes.

- A [8] In the event, I am satisfied that from the tests conducted by PW7 and from the evidence he had adduced in court, the said drugs were cannabis as defined by the DDA.

Custody And Control

- B [9] Upon the facts and evidence as adduced. I find as a fact that the said incriminating exhibits were wholly under the custody and control of the accused.

- C [10] I have no reason to reject the testimonies of PW5, the arresting officer and the officer who effected the seizure of the exhibits; PW9, the ex-wife of the accused who had married the accused for about a week before the raid and who had been since then staying with the accused in the said house off and on for a total of 3 or 4 days prior to the arrest of the accused and PW8, the supervisor incharge of Pejabat Pos Bukit Pasir. Their testimonies were consistent and cogent enough and did not suffer from any apparent infirmities to warrant rejection.

- E [11] PW5 confirmed that at the time of the raid, only the accused and PW9 were in the house. His testimony that the incriminating exhibits were found inside the said postal bag located inside the rear room of the house was not challenged. Equally not challenged was his testimony that in this rear room there were several personal items belonging to the accused. Also not challenged was his testimony that he had seized only one key to the front door of the said house. The evidence of PW5 indicated that the accused was the sole occupier of the said house with PW9.

- G [12] PW9 confirmed that at the time of the raid, the said house was only occupied by the accused and herself. She confirmed that there was only one key to the house, ie, the key to open the front main door of the house and the said key will be taken by the accused whenever they leave the house. She also confirmed that the postal bag (exh. P9A) was the accused's working bag and she saw the accused using/carrying the said postal bag that morning for work. She confirmed that the accused would normally put the said postal bag at the rear room upon returning from work. She also confirmed that she was shown the contents of the said postal bag by PW5 soon after its seizure and confirmed that the incriminating exhibits inside the said postal bag was not hers and that she did not put the said exhibits inside the said postal bag. She confirmed that her relative, Wan, did come to the said house that evening at about

6pm for a short while and that the said Wan did not venture beyond the living room of the said house though put to her that the said Wan had in fact went to the rear room.

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[13] PW8 testified that the accused was one of the postmen under his supervision. The accused's job is to deliver letters to the public. He confirmed that the house/quarters No. 453A, Kuaters Pos, Jalan Bukit Pasir, Bukit Pasir, was allocated to the accused in 2001. He confirmed that the accused had occupied the said house since 2001. The accused was occupying the said house singularly until his marriage to PW9 about a week before the raid by PW5. He confirmed that the postal bag (exh. P9A) belonged to the Postal Services but was allocated to the accused in furtherance of his job scope. The accused was solely responsible for the safe keeping of the said postal bag during and after office hours. The accused was allowed to bring home the said postal bag after the day's job is done. PW8 also confirmed that the set of uniform seized by PW5 from the rear room of the house was issued by the Postal Services to the accused. PW8 also confirmed that there is only one key to the house and that key was issued to the accused and the said key was the key seized by PW5.

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[14] From the totality of the testimonies of these witnesses I have no doubt that the said incriminating exhibits were wholly under the custody and control of the accused. Any other findings could well have been perverted - *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 followed.

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Knowledge

[15] The seizure of the postal bag (exh. P9A) containing the incriminating exhibits from the rear room of the house went largely unchallenged. The postal bag was not hidden nor locked. It could be opened very easily. The accused was the master of the house. He was seen by PW9 using/carrying the said postal bag that morning. By the same evening the same postal bag was back inside the house. He must have been the only person handling the postal bag. PW9 testified that she has nothing to do with the postal bag and its contents therein. I accepted her evidence in respect of the same as there is no reason for me to otherwise treat her testimony with suspect.

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- A [16] Knowledge though cannot be proved by direct evidence, however could be inferred from the set of facts, evidence and circumstances surrounding the particular case - see *Parlan Dadeh v. PP* [2009] 1 CLJ 717, *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597, *Wong Nam Loi v. PP* [1998] 1 CLJ 37, *Samundee Devan a/l Kerishna Muthu v. PP* [2009] 1 CLJ 498. The accused, on the facts must have been seized with the knowledge that the said postal bag contained the drugs that is now the subject matter of the charge. This is the only logical inference that can be inferred from the set of evidence adduced - see *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337.
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Possession

- D [17] The prosecution having proved that the accused had custody/control and knowledge of the contents of the postal bag ie, the four blocks of cannabis, it is my further findings that the accused was indeed having in his possession the said postal bag containing the 4 blocks of cannabis. On the facts he was well endowed with the powers to dispose off the said cannabis. Having custody/control, knowledge and powers of disposal are the elements constituting possession. On all fours the prosecution's job is done.
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Statutory Presumption

- F [18] The combined weight of the cannabis in the possession of the accused obviously exceeded the minimum statutory weight of 200 grammes as provided by s. 37(da)(vi) of the DDA. It shall thus be presumed that the accused was trafficking in the said drugs, until the contrary is proved. On the facts the prosecution had correctly relied on this presumption.

G *Prima Facie Case*

- H [19] It is thus my findings that at the end of the prosecution's case, upon a maximum evaluation of the evidence adduced, the prosecution had made out a *prima facie* case against the accused on the charge preferred - see *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. Should the accused remain silent, the evidence adduced is sufficient to warrant his conviction. The accused was ordered to enter his defence. He opted to testify on oath.
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The Defence Case**A**

[20] The evidence of the accused.

[21] The accused testified that there were three sets of keys of the main door of the house - one with him, one with PW9 and another with Wan who is PW9's nephew. Wan used to frequent his house as and when he feels like coming to the house. He admitted that the said postal bag was allocated to him, was with him and was using it at the material time.

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[22] On 23 July 2004 he came home from work at about 6.05pm. His postal bag was empty and upon reaching home he placed the said postal bag at the rear room. PW9 was already at home. Next he took his bath and went to rest at the living room, watching TV.

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[23] At about 6.30pm Wan came to the house. He carried with him a transparent plastic bag. He went straight to the rear room. About five minutes later he came out of the rear room and sat with him to watch TV. Now he did not bring the plastic bag with him.

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[24] At about 7pm he went to Masjid Besar located about 100 meters away from his house to perform his Solat Magrib. He went alone. Wan remained behind. He came back from the Masjid at about 8.45pm. Wan was still in the house. They had dinner together and Wan eventually left at about 11pm without carrying the plastic bag he had with him earlier.

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[25] At about 12.30am on 24 July 2004, the police raided his house and recovered the said incriminating exhibits from inside the said postal bag placed by him inside the rear room. He denied having anything to do with the incriminating exhibits. He testified that the four blocks of cannabis inside the Astaka plastic bag were not his. He also testified that he did not put the Astaka plastic bag with the four blocks of cannabis inside the postal bag allocated to him.

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[26] These were the essence of the accused's defence, a complete denial of having in possession of the said incriminating exhibits and directly implicating Wan for all the misfortunes now heaped upon him.

H**I**

A Findings

[27] It is apparent that the presence of Wan in the house formed the backbone of the accused's defence. There is common ground between the defence and the prosecution that Wan is a real person. Both parties are also in agreement that Wan had come into the house at some point in time hours before the house was raided by the police. PW9 testified that Wan was there for about 1/2 an hour and did not venture beyond the living room of the house, whereas the accused said that Wan came at about 6.30pm, went to the rear room carrying a plastic bag, had dinner with them and only left at about 11.30pm that night without carrying the plastic bag he had brought to the house earlier. The nature of the cross-examination of the accused shows that the prosecution was agreeably with the defence that Wan was at the said house for a period of the time much longer than what was elicited from the testimony of PW9. It is obvious that only Wan can tell how long he was at the accused's house.

[28] Now, the rear room was not locked and the postal bag was also not locked. It was put to PW9 that Wan went to the rear room of the house carrying the plastic bag containing the blocks of cannabis. This was denied by PW9 but PW9 herself did not know who put the said drugs into the postal bag. Again it is obvious that only Wan can explain and close this gap. It is also obvious that the presence of Wan and general defence of the accused is not a recent concoction. The prosecution was aware of Wan's presence from the very beginning.

[29] From the nature of the defence posited by the accused, it is very apparent that Wan has become a very material witness. It is thus crucial for the prosecution to close the gap enumerated above through Wan. In such event the failure of the prosecution to call Wan before the close of the prosecution case or to offer Wan to the defence or to call Wan in rebuttal of the defence, clearly warrants the court to invoke the adverse inference rule under s. 114(g) of the Evidence Act 1950, against the prosecution even at the stage of the defence case. In this regard I am fortified by the judgment of his Lordship Augustine Paul J (as he then was) in *PP v. Chia Leong Foo* [2000] 4 CLJ 649. At pp. 678-679 he stated, for brevity and convenience, reproduced below:

I On the facts of this case the prosecution may find it difficult to adduce the evidence in rebuttal of Yee Chin Koon as it had been in its possession from the very beginning and as it has already been

put to the prosecution witnesses by the defence. This means that the prosecution was already aware of the defences to be raised. It cannot be said that the suggested defences were of minimal, doubtful or marginal value at that stage and having assumed probative force when the defence was presented warrant evidence in rebuttal to be allowed. When the defences were suggested they struck at the very core of the prosecution case thereby negating the argument that they were of minimal, doubtful or marginal value at that stage. It may therefore be argued that the prosecution ought to have adduced the evidence in the course of its case and not by way of rebuttal. The inability of the prosecution to bring on record the evidence of Yee Chin Koon at the close of the defence case, if deemed necessary, may therefore attract s. 114(g) against it even at the stage. In this regard *Law of Evidence* (16th edn) Vol 1 by Woodroffe & Amir Ali says at p. 395:

Presumptions of fact are not necessarily taken up at the beginning of the consideration of a case or of any particular part of it. They are really assumptions of fact which may be made at any stage of a case.

The presumption arising under s. 114(g) is one of fact. It can therefore be raised at the end of the whole case. This is logical as the legal burden to prove the case is on the prosecution till the conclusion of the case. It is at the conclusion of the trial that the court will consider all the evidence adduced before it and decide whether the prosecution has proved its case beyond reasonable doubt. This exercise will necessarily entail a consideration of whether the defence advanced, where reasonable, have been negated by the prosecution. This can only be done by an evaluation of the evidence of witnesses who have been called by the prosecution and evidence which could have been adduced but was not. The exercise may reveal that the evidence of a witness not called, though not material at the close of the case for the prosecution, has turned out to be crucial in the light of the defence presented. The absence of the evidence of that witness on record at that stage may lead to the inference that if he had been called to testify by the prosecution in the course of its case his testimony would have been unfavourable within the meaning of s. 114(g). It cannot be argued that the burden would be on the accused to call Yee Chin Koon as a witness. There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other (see *Goh Ah Yew v. PP* [1949] MLJ 150; *Abu Bakar v. R* [1963] MLJ 288; *Tan Foo Su v. PP* [1967] 2 MLJ 19). It is not the duty of the defence to fill in any gap in the prosecution case. The position is different where a presumption has been invoked thereby placing an onus on the accused to prove certain facts. Where there is such a burden

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- A on an accused the onus is on him to prove the facts and failure to call a material witness to establish the facts may result in an adverse inference being drawn against him (see *Baharom v. PP* [1690] MLJ 249; *PP v. Dato' Seri Anwar bin Ibrahim (No. 3)*). This, of course, is not the position in this case. The materiality of Yee Chin Koon therefore remains to be seen in the light of the defence to be advance.
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Clearly the failure to call Wan or to offer Wan to the defence or in rebuttal is fatal to the prosecution.

- C [30] The defence is only required to raise a reasonable doubt on the prosecution's case. On the facts and evidence, upon evaluation of the defence's case as against the prosecution's case, it is my findings that the defence has succeeded in raising a reasonable doubt upon the prosecution's case. Conversely the prosecution had failed to prove beyond a reasonable doubt that the accused was in possession of said postal bag containing the blocks of cannabis therein. Therefore the statutory presumption under s. 37(da) of the DDA could not apply.
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- E [31] Accordingly the accused is acquitted and discharged of the offence as levelled against him.

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